

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA	:	Criminal No.: 00 CR. 583
 v.	:	 Filed: May 31, 2000 (Under Seal)
 JOHN DICARLO;	:	 Violation: 15 U.S.C. § 1
NICHOLAS A. PENACHIO;	:	
GORDON KERNER;	:	Seal Lifted: June 1, 2000
DICARLO DISTRIBUTORS, INC.;	:	
NICK PENACHIO CO., INC.;	:	
LANDMARK FOOD CORP.;	:	
 Defendants.	:	
	:	

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INDICTMENT

SHERMAN ACT CONSPIRACY
(15 U.S.C. § 1)

The Grand Jury charges:

1. John DiCarlo, Nicholas A. Penachio, Gordon Kerner, DiCarlo Distributors, Inc., Nick Penachio Co., Inc., and Landmark Food Corp. are hereby indicted and made defendants on the charge stated below.

I. THE RELEVANT PARTIES AND ENTITIES

During the period charged in this Indictment:

2. Defendant John DiCarlo was a resident of Shoreham, New York. He was a vice president of DiCarlo Distributors, Inc.

3. Defendant Nicholas A. Penachio was a resident of Mount Kisco, New

York. He was the president and a co-owner of Nick Penachio Co., Inc.

4. Defendant Gordon Kerner was a resident of Lloyds Neck, New York. He was the president and a co-owner of Landmark Food Corp.

5. DiCarlo Distributors, Inc. ("DiCarlo, Inc.") was a New York State corporation located in Holtsville, New York. DiCarlo, Inc. was a vendor of food, primarily frozen food, produce, dairy products, and groceries.

6. Nick Penachio Co., Inc. ("Penachio Co.") was a New York State corporation located in the Bronx, New York. Penachio Co. was a vendor of food, primarily produce and frozen food.

7. Landmark Food Corp. ("Landmark") was a New York State corporation located in Holtsville, New York. Landmark was a vendor of food, primarily produce, frozen food, and groceries.

8. The Board of Education of the City of New York ("NYCBOE") was the entity responsible for operating New York City's public school system, the largest in the United States. Its annual budgets, which approached \$10 billion, were funded by the federal, state, and city governments. It serviced a student population of nearly 1.1 million and operated more than 1,500 facilities. It served approximately 640,000 lunches and 150,000 breakfasts every school day, the majority of which were subsidized by various government programs, primarily those programs established pursuant to the National School Lunch Act of 1946

and administered by the United States Department of Agriculture.

9. The NYCBOE solicited bids from, and awarded contracts to, vendors of food on a regular basis. The primary food contracts awarded by the NYCBOE were requirements contracts that obligated the vendors to supply and deliver food at the stated prices for the contract period. Both public and non-public schools received food pursuant to these contracts. Individual schools placed orders as needed, usually once or twice a week.

10. The NYCBOE sought separate bids, and awarded separate contracts, for the supply of a number of categories of food, including frozen food, produce, and groceries. Each of these bids and contracts was divided into parts, usually geographically by borough. The company bidding the lowest price for a particular part of a contract usually received an award for that part. The term of most of these contracts varied from three to six months. Toward the expiration of the contract period, the NYCBOE again solicited bids for the supply of food.

11. The NYCBOE required bidders to certify, under penalty of perjury, that, among other things, the prices in their bids had been arrived at independently without collusion, consultation, communication, or agreement for the purpose of restricting competition as to any matter relating to such prices, with any other bidder or with any competitor.

12. Whenever in this Indictment reference is made to any act, deed, or transaction of any corporation, such allegation shall be deemed to mean that the corporation engaged in such act, deed, or transaction by or through its officers, directors, agents, employees, or other representatives while they were actively engaged in the management, direction, control, or transaction of its business or affairs.

13. Various persons and firms, not made defendants herein, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof. These included Selwyn Lempert ("Lempert"), Steven Kanowitz, Kanowitz Fruit & Produce, Inc., Harry Levy, Clifton Fruit & Produce, Inc., David Axelrod, Toby Unger, Baiardi Chain Food Corp., Michael Beberman, and John Doody.

II. TRADE AND COMMERCE

14. During the period covered by this Indictment, DiCarlo, Inc., Penachio Co., and Landmark purchased substantial quantities of food, including produce, for resale to the NYCBOE from suppliers located throughout the United States, or from wholesalers who obtained their goods from suppliers located throughout the United States.

15. From approximately 1991 until approximately April 1999, pursuant to contracts that are the subject of this Indictment, the NYCBOE purchased

approximately \$87 million of produce from members of the conspiracy, including approximately \$25.3 million from Penachio Co., approximately \$5.3 million from DiCarlo, Inc., and approximately \$14.8 million from Landmark.

16. The activities of the defendants and co-conspirators with respect to the sale of food to the NYCBOE, including the sale of produce pursuant to contracts that are the subject of this Indictment, were within the flow of, and substantially affected, interstate trade and commerce.

III. DESCRIPTION OF THE OFFENSE

17. From approximately 1991 until approximately April 1999, the exact dates being unknown to the Grand Jury, the defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act (Title 15, United States Code, Section 1).

18. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were to rig bids and allocate contracts for the supply of produce to the NYCBOE.

19. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and conspired to do, including, among other things:

(a) From approximately 1991 until approximately April 1999, the defendants and co-conspirators participated in meetings or conversations where they discussed and agreed how to bid so as to divide upcoming contracts to supply produce to the NYCBOE. These meetings were held at different sites in or near New York City, including the offices of the defendant Penachio Co. in the Bronx;

(b) Certain of the defendants and co-conspirators designated which co-conspirators would be the low bidders, among the co-conspirators, on specified parts of contracts to supply produce to the NYCBOE;

(c) Certain of the defendants and co-conspirators discussed and agreed on the prices or price levels they would bid on specified parts of contracts to supply produce to the NYCBOE, and then bid accordingly. As a result, some of the members of the conspiracy sometimes raised the prices in their bids by 10% or more;

(d) Certain of the defendants and co-conspirators refrained from bidding or submitted intentionally high, complementary bids on specified parts of contracts to supply produce to the NYCBOE;

(e) Certain of the defendants and co-conspirators gave substantial amounts of cash to co-conspirator Lempert, an employee of Penachio Co., with the understanding that Lempert would use the cash to pay one or more potential

bidders not to bid competitively on particular contracts to supply produce to the NYCBOE;

(f) Defendants John DiCarlo and DiCarlo, Inc. joined the conspiracy in approximately 1997. Prior to that time, DiCarlo, Inc. had bid competitively on particular bids to supply food, including frozen food, produce, and groceries, to the NYCBOE. Certain of the defendants and co-conspirators initially discussed offering \$100,000 or more in cash to induce DiCarlo, Inc. not to bid competitively. Ultimately, Landmark, which for some years had been designated to be the low bidder among the conspirators for contracts to supply produce to schools in Manhattan, agreed to relinquish Manhattan to DiCarlo, Inc. in exchange for \$100,000 in cash per bid cycle. DiCarlo, Inc. then agreed to take Landmark's place as the low bidder among the conspirators for future NYCBOE contracts to supply produce to schools in Manhattan, and to stop bidding competitively for contracts to supply frozen food to the NYCBOE; and

(g) Certain of the defendants and co-conspirators falsely certified, under penalty of perjury, that, among other things, the prices in their bids had been arrived at independently without collusion, consultation, communication, or agreement for the purpose of restricting competition as to any matter relating to such prices, with any other bidder or competitor.

IV. JURISDICTION AND VENUE

20. The aforesaid combination and conspiracy was formed and carried out,

in part, within the Southern District of New York within the five years preceding the filing of this Indictment.

IN VIOLATION OF TITLE 15, UNITED STATES CODE, SECTION 1

A True Bill

_____/s/_____
Foreperson

_____/s/_____
JOEL I. KLEIN
Assistant Attorney General

_____/s/_____
JAMES M. GRIFFIN
Deputy Assistant Attorney General

_____/s/_____
SCOTT D. HAMMOND
Director of Criminal Enforcement

Antitrust Division
U.S. Department of Justice

_____/s/_____
MARY JO WHITE
United States Attorney
Southern District of New York

_____/s/_____
RALPH T. GIORDANO
Chief, New York Office

_____/s/_____
REBECCA MEIKLEJOHN

_____/s/_____
DOUGLAS M. TWEEN

_____/s/_____
MARY ANNE F. CARNIVAL

_____/s/_____
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SOUTHERN DISTRICT OF NEW YORK May 31, 2000
Returned into the District Court by the Grand Jurors and filed.